Supreme Court, U.S.
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No.

**IN THE
SUPREME COURT OF THE
UNITED STATES**

October Term, 1998

State of Michigan,
Petitioner,

vs

Markee Bailey,
Respondent.

**On Petition for a Writ of Certiorari
to the Supreme Court
of the State of Michigan**

Petition for Writ of Certiorari

Submitted by:
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Question presented

Respondent's initial encounter with the police was not a violation of his Fourth Amendment rights and a serendipitous find of a bag of marijuana dropped by respondent on exiting his van was properly seized and admitted into evidence at trial.

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IN THE
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State of Michigan,
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-vs-

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Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan

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Now comes the state of Michigan, Petitioner herein, by Arthur A. Busch, Prosecuting Attorney in and for the County of Genesee, Michigan, and Donald A. Kuebler, Chief, Research, Training and Appeals, and prays that a Writ of Certiorari will issue to review the judgment of the Supreme Court of Michigan filed on March 31, 1998 affirming the unpublished per curiam opinion and order of the Michigan Court of Appeals entered December 12, 1997 which reversed respondent's jury-based conviction and sentence for possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c) and his plea-based conviction and sentence to being an habitual offender, third offense. MCL 769.11; MSA 28.1083. [App 1a-4a]

[Citations to opinions below]

The unpublished decision of the Michigan Court of Appeals was filed December 12, 1997 in **People v Bailey** CA 199473, and leave to appeal was denied the people, petitioner, by the Michigan Supreme Court in **People v Bailey** SC 111440 in an order entered March 31, 1998. [App 1a-5a]

[Jurisdiction]

An order of the Michigan Supreme Court was issued March 31, 1998 denying petitioner's application for leave to appeal, thus affirming the Michigan Court of Appeals opinion holding that all incriminating evidence "flowing from the invalid **Terry** stop and subsequent arrest of defendant should have been suppressed."

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. section 1257(a).

[Constitutional provision involved]

Constitution of the United States, Amendment IV:

> "**Unreasonable searches and seizures; search warrant.** The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[Statement of facts]

A Genesee County Michigan jury convicted respondent of possession with intent to deliver marijuana. MCL 333.7401 (2)(c); MSA 14.15(7401)(2)(c). He subsequently entered a plea of guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced to prison for a term of four to eight years. [App 1a]

Prior to trial defendant filed three motions: 1) a motion to suppress; 2) a motion to bar drug profile testimony, and 3) a motion to inform the jury of his possible sentence because of his habitual offender third felony status should he be convicted.

The trial court ruled on the motion to suppress as follows:

> THE COURT: "See, I get the impression when you hear these cases that you must put yourself in the same position as the officer at the time. It's easy for us to sit back here and say well, these are the things that could have been done.
>
> But I try to be very realistic. They see a van with a number of people in it, they see what they believe to be very unusual circumstances of movement within the vehicle.
>
> They have a right to go over to the vehicle, I don't know anything under the law that prevents that. That's certainly not a stop, the vehicle was parked there.
>
> They go there and they see what they believe to be suspicious movements on the part of the driver. In response to inquire as to identification, which I think they reasonably can make at that

> point, they see movement by the driver which causes them some considerable concern, particularly by reason of it being in an area which has a reputation or a record of being a site of drug dealing or illegal activity. I don't see anything wrong with it. It's not a perfect case, I know that. And I can understand that there's some things that might have been done that would give us even a better and a more solid basis for the arrest.
>
> **But I think that under all the factors that I've heard and these circumstances, I would deny that motion."** [Emphasis added]

[Trans. 5/11/94, pp 27-28]

Respondent filed for delayed leave to appeal on August 21, 1995, nearly one year after sentencing. The Court of Appeals denied the application on December 19, 1995 for lack of merit. [**People v Bailey**, CA 188569, order of 12-19-95]

Respondent filed a motion for reconsideration on December 21, 1995. The Court of Appeals denied the motion on February 8, 1996. [**People v Bailey**, CA 188569, order of 2-8-96]

Respondent then filed an application for leave to appeal to the Michigan Supreme Court. In lieu of granting leave to appeal, the case was remanded to the Michigan Court of Appeals for consideration as on leave granted, with attention to **People v Shabaz**, 424 Mich 42 (1985), and **People v Hubbard**, 209 Mich App 234 (1985), **lv den** 450 Mich 961 (1996). (**People v Bailey**, SC 105603, order dated 11/26/96)

The Court of Appeals, in an unpublished, per curiam, opinion entered December 12, 1997, reversed. The Court held that the investigative stop and seizure of respondent were invalid and, but for this stop and seizure, the evidence would not have been discovered. [App 1a-7a]

Petitioner filed for leave to appeal with the Michigan Supreme Court. Leave to appeal was denied because the Court "was not persuaded that the questions presented should be reviewed by this Court." [App 8a, order of denial, Mar. 31, 1998]

[Reasons for granting the Writ]

Petitioner, the people of the state of Michigan, maintains that respondent's initial encounter with the police was not a violation of his Fourth Amendment rights and that a serendipitous find of a bag of marijuana dropped by respondent on exiting his van was properly seized and admitted into evidence at trial.

[Standard of Review]

The standard of review to be applied to a lower court's ruling on a defendant's motion to suppress is whether or not the decision is "clearly erroneous." See e.g., **People v Esterbrooks**, 175 Mich App 532, 535; 438 NW2d 327 (1989); **People v Burrell**, 417 Mich 439; 339 NW2d 403 (1983).

In determining whether the officers' actions were reasonable under the Fourth Amendment, the court on appeal employs a **de novo** review. The court on appeal must accept the trial court's findings of fact unless they are clearly erroneous. See e.g., **Gallegos v City of Colorado Springs**, 114 F3d 1024, 1027 (1997) and citations.

Respondent contended in the Michigan Court of Appeals that the initial encounter with the police and his subsequent arrest was without probable cause and a violation of his Fourth Amendment right to be secure from unreasonable searches. Respondent, however, submits that the encounter was merely a reasonable investigation and not offensive to the Fourth Amendment in light of the great public interest in preventing drug trafficking.

It is true that the Fourth Amendment guarantees a person's right to be free from unreasonable searches and seizures. To determine whether a violation has

occurred, the trial court must consider all of the facts presented to the officer at the time of the encounter.

In Michigan the courts have recognized three levels of police encounters with citizens. **People v Shabaz**, 424 Mich 42; 378 NW2d 451 (1985). The first is an informational encounter. The police may address questions to any citizen on the street in an attempt to gain information and there is no detention. Therefore, the encounter is not a seizure and the protection of the Fourth Amendment is not invoked.

The second type of encounter is an investigative encounter. This is based on fact the police have an interest and an obligation to prevent crime. A forcible investigative stop still triggers the Fourth Amendment, but is permissible where an officer has reasonable suspicion that criminal activity is afoot. **Terry v Ohio**, 392 US 1; 20 L Ed 2d 889 (1968). This type of encounter is commonly called a **Terry** stop. It is a limited exception to the general rule that all restraints of a person must be justified by probable cause. **Terry** provides that certain seizures are justifiable under the Fourth Amendment if there is articulatable suspicion that a person has committed or is about to commit a crime. **Shabaz**, **supra**, @ 157.

The third tier of police contacts with citizens is the arrest of the individual. The arrest in the case at bar only occurred after it was determined that the defendant was in violation of the Controlled Substance Act, by his possession of marijuana.

Clearly, the facts of this case fall within the second tier of police contacts described in **Shabaz**. When Officer Kendall approached the parked vehicle, it was for

the limited purposes of determining whether the occupants were in violation of a local ordinance against loitering, frequenting, or remaining on or in any public place for the purpose of unlawfully using, possessing, offering for sale, selling, furnishing or dispensing any controlled substance and/or drug paraphernalia. [See City of Flint ordinance #31-12, passed 04-17-93.] The detention of respondent was not intrusive and was brief.

In **People v Khan**, 638 NYS2d 858 (1995) the court held that a police officer's act of approaching an occupied stationary vehicle is a minimal intrusion that is not the equivalent of a stop.

In **State v Langseth**, 492 NW2d 298 (1992) the court said that a police officer may learn something during caretaking or casual encounter with a citizen that leads to reasonable suspicion and that reasonably justifies further investigation, seizure, or even arrest.

In **Com v Tither**, 671 A2d 1156 (1996) the court said that a police officer has authority to approach or briefly detain a citizen without probable cause for investigatory purposes.

In **United States v Cannon**, 29 F3d 472 (1994) the court held that a pretext stop is valid if a reasonable officer would have made the stop anyway, apart from suspicions about more serious criminal activity.

In **State v Johnson**, 853 P2d 34 (1993) the court said that without making an arrest, a law enforcement officer may stop any person in a public place whom such officer reasonably suspects is committing, has committed, or is about to commit crime and may demand name and address of such suspect and an explanation of such suspect's actions.

In **State v Van Ackeren**, 495 NW2d 630 (1993) it was held that an officer is not required to wait until crime has occurred before making an investigative stop.

In **United States v Chhunn**, 11 F3d 107 (1993) the court ruled that police officers may briefly detain and ask questions of people whom they reasonably suspect of criminal activity.

In **United States v Smith, 3 F3d 1088 (1993)**, cert den, 126 L Ed 2d 696, the court said that "reasonable suspicion" that a person is engaged, or about to be engaged, in criminal activity, for purposes of determining the validity of an investigatory stop, is considerably easier for the prosecution to establish than probable cause. The prosecution must demonstrate a minimal level of objective justification for the officer's actions, measured in light of the totality of the circumstances. Stated another way, because an investigative stop is a lesser restriction on freedom of movement than an arrest, it is allowed on a showing of reasonable suspicion rather than probable cause. In **Smith** the court also said that for Fourth Amendment purposes, temporary detention is permitted without a warrant and on basis of reasonable suspicion less than probable cause; however, if the search or temporary detention goes beyond what is necessary, it is no longer valid under **Terry**, and its fruits will be suppressed.

Under **Terry**, the court makes a twofold inquiry in order to determine the reasonableness of an investigative detention: first, was the police officer's action justified at its inception and, second, was the officer's action reasonably related in scope to the circumstances which justified the interference in the first place. **United States v Strickling**, 924 F Supp 1057 (1996).

In **United States v Haskins**, 773 F Supp 965 (1991), aff'd 983 F2d 1061 (1991) the court said that under **Terry**, the detaining officer must point to specific and articuable facts which, taken together with rational inferences from those facts, reasonably warrant a seizure, the seizure must be justified by reasonable suspicion at the inception of the intrusion; and the search must be reasonably related in scope to the circumstances justifying the intrusion in the first place.

In **United States v Torres**, 894 F Supp 1432 (1992), aff'd 5 F3d 548 (1992) the court said that nervousness alone can give rise to reasonable suspicion of illegal activity.

Although a mere hunch is insufficient, an officer's stop may be proper under circumstances which would be insufficient to establish probable cause for an arrest. **People v Peterson**, 618 NE2d 388 (1993).

In **State v Martin**, 643 So2d 830 (1994) the court said that a place is known to be a high crime area is a contributing fact upon which a police officer can rely in making an investigatory stop and is relevant in a determination of reasonable suspicion. Accord, see **State v Thorton**, 621 So2d 173 (1993) where the court said that reputation of an area is an articuable fact upon which an officer can rely and which is relevant in a determination of reasonable suspicion for an investigatory stop. See also **State v Gainer**, 591 So2d 1328 (1991).

Petitioner disagreed with respondent's representations that Officer Kendall had his weapon drawn as he approached the van, thus possibly elevating the level of the encounter. To the contrary, the officer's testimony at both the preliminary examination and at trial was that he approached the van to identify the

respondent. The officer did not draw his firearm until after respondent had refused to comply with the officer's request and continued to hide his hand from the officer's view. (PET, pp 14-15, TT, Vol I, p 35).

The criteria for the police to justify an investigatory encounter (i.e., a **Terry** stop) in these situations "are that the police must have a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing." **Shabaz, supra**, @ 59. The Michigan Supreme Court stated:

> As the Supreme Court stated in **United States v Cortez**, [449 US 411; 66 L Ed 2d 621 (1981)] the "articulable reasons" or "founded suspicion" or "particularized suspicion" that criminal activity is afoot must derive from the police officer's assessment of the "whole picture"--the totality of circumstances with which he is confronted. **Shabaz, supra p 59.**

In **United States v Mendenhall**, 446 US 544; 64 LEd 2d 497; 100 SCt 1870, reh den (US) 65 LEd 2d 1138, 100 SCt 3051, three justices, concurring with judgment, felt that:

> "The jurisprudence of the Fourth Amendment demands consideration of the public's interest in effective law enforcement as well as each person's constitutional secured right to be free from unreasonable searches and seizures. In applying a test of "reasonableness", courts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience."

And on determining reasonableness standards in **United States v Sutton**, 794 F2d 1415 (1986), the US Supreme Court held that:

> "The fact that Deputy Harrington did not actually observe any criminal activity is irrelevant as "the facts are measured against an objective reasonable man standard, not the subjective impressions of the particular officer." **United States v Mallides**, 473 F2d 859, 861 (CA 9 1973). It is irrelevant that the vehicle could have been at Bomber's Square for innocent purposes. The test is not whether the conduct under question is consistent with innocent behavior; law enforcement officers do not have to rule out the possibility of innocent behavior. **United States v Holland**, 510 F2d 453; 455 (CA 9) cert den, 422 US 1010, 95 SCt 2634, 45 LEd 2d 674 (1975).

Further, in **People v Nelson**, 443 Mich 626, 635, 505 NW2d 266 (1993), the Court held that:

> "It is apparent that just as many illegal implications can be attributed to the conduct as legal ones, but as stated above, the question is not the number of scenarios that the imagination can conjure, **but the degree of suspicion conferred on the seemingly legal conduct." People v Nelson**, 443 Mich 626, 635, 505 NW2d 266 (1993).

The Michigan Court of Appeals has held that there are fewer foundation of facts necessary when moving vehicles are involved.

> "Because fewer foundational facts are necessary to support a

> finding of reasonableness when moving vehicles are involved **Whalen, supra**, 390 Mich at 682, 213 NW2d 116, we hold that the trial court erred in concluding that the investigatory stop of defendant's vehicle was unreasonable. The investigatory stop was a 'minimal intrusion' of defendant's Fourth Amendment rights in light of defendant's potential danger to the public. **People v Nelson**, 443 Mich 626, 637, 505 NW2d 266 (1993). citing from **People v Christe**, 206 Mich App 304, 309-10, 520 NW2d 647 (1994).

In the case **sub judice**, the officers were surveilling a public park in Flint in an area designated as a "drug zone". The officers spotted a man drinking beer within the park and entered the parking lot to further investigate when they passed the respondent in his parked van. Movements indicating evasiveness were observed by the officers, thus prompting them to make the initial encounter to investigate the possibility of the respondent's infraction of the city ordinance against loitering in a posted "drug zone". The officers decision to investigate respondent was reasonable. Public interest in preventing drug traffic is great, and the intrusion upon respondent's privacy was minimal at this point in time.

It was respondent's continued evasive acts and gestures that prompted the officers to fear for their own safety. When asked to produce identification, respondent continued to make motions that indicated to Officer Kendall that he was hiding something. When asked to raise both hands, only one was free to be raised. Thus, Officer Kendall ordered the respondent out of the vehicle, and in

doing so, respondent dropped a bag of marijuana at his feet. Officers Kendall and Mayfield now had probable cause to arrest and search the respondent and his vehicle.

Petitioner respectfully submit that reversal by the Michigan Court of Appeals was improper and that its application for leave to appeal was improperly denied by the Michigan Supreme Court. The playing down of the facts of the case by the Court of Appeals to reach the result of reversal is unwarranted. (App 3a) Contrary to the holding of the Court of Appeals, petitioner maintains that the police here had a particularized and objective basis for suspecting criminal activity. The Michigan Court of Appeals failed to give deference to the totality of the circumstances known to the surveilling police. "Reasonable suspicion" of criminal activity sufficient to warrant a stop requires only articuable facts, focusing on a particular person, place, or thing, as judged by a reasonable and experienced law enforcement officer. **State v Affsprungt**, 854 P2d 873 (1993). Contrary to the holding of the Michigan Court of Appeals in this case, it is said that innocent activity can give rise to reasonable suspicion to stop and frisk, but in that circumstances some indicia of criminal conduct, such as furtive mannerisms, must still lead law enforcement officer to reasonable suspicion of particular criminal activity. **State v Jones**, 835 P2d 863 (1992).

In **State v Watson**, 458 SE2d 519 (1995) the court said that the officer's experience and training can create reasonable suspicion for an investigatory stop and that the defendant's actions must be viewed through the officer's eyes.

In the case **sub judice** the Michigan Court of Appeals held that the "police did

not have a reasonable and articulable suspicion that criminal activity was afoot to justify an investigatory stop." [App 2a] Petitioner maintains the Court of Appeals holding is contrary to the decision of this Honorable Court in the case of **Florida v Bostick**, 501 US 429 (1991). It is certain after **Bostick** that a majority of the Supreme Court no longer concludes that the Fourth Amendment requires reasonable suspicion as a premise for an investigative stop. See **State v Mullen**, 827 P2d 1133 (1992).

Recent decisions indicate that not all police-citizen encounters implicate the Fourth Amendment. **United States v King**, 990 F2d 1552, 1556 (1993). Mere questioning by the police does not amount to a seizure and "'law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place.'" Id. at 1557 quoting **Bostick** at p 434.

In determining the reasonableness of an investigatory detention, "'common sense and ordinary human experience must govern over rigid criteria.'" **United States v Walraven**, 892 F2d 972, 975 (1989) quoting **United States v Sharp**, 470 US 675, 685 (1985). Further, the Fourth Amendment "'does not require police officers to close their eyes to suspicious circumstances.'" Id. at 976 quoting **United States v Espinosa**, 782 F2d 888, 891 (1986).

Petitioner maintains that under the facts of this case and the jurisprudence, the initial encounter was justified at its inception. Petitioner further maintain that the officer's actions here were reasonably related in scope to the circumstances which justified the interference in the first place. **King**, 990 F2d at 1557, quoting **Terry**, 392 US at 20.

In the case **sub judice**, while the Michigan Court of Appeals suggests otherwise, the police officers should not take unnecessary risks in performing their duties, they are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of [a **Terry**] stop."

Petitioner maintains that the conduct of the police in approaching respondent's van was proper under the circumstances and that the drawing of the weapon by Off. Kendall was not unreasonable considering the situation. There was nothing unreasonable about ordering the occupants of respondent's van to put their hands up and there was nothing unreasonable about repeating the order four times when they refused to comply. [App 1a]

Respondent's real trouble began in this case after he exited the van while hiding his right hand and dropped ziplock baggie containing a half ounce of marijuana to the ground. Clearly, at that time a crime was occurring and the police officers acted reasonably under the circumstances. The lawful conduct of the police in approaching the van occupied by respondent, followed by respondent's exiting of the van and the dropping of the baggie of marijuana, creating a so-called serendipitous find, should compel this Court to grant this petition for certiorari.

[Conclusion]

Wherefore, petitioner respectfully requests that this Honorable Court will grant this petition for a Writ of Certioraria to review the judgment of the Michigan Supreme Court and Michigan Court of Appeals.

Dated: June 24, 1998

Respectfully submitted:

_____

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[Petitioner's Appendix]

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

UNPUBLISHED
Dec. 12, 1997

No. 199473

v

Genesee
Circuit Court
LC93-49618-FH

MARKEE BAILEY,
Defendant-Appellant

Before: Sawyer, P.J. and Hood and Hoekstra, JJ.

PER CURIAM

Defendant was convicted, following a jury trial, of possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). He subsequently pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to four to eight years' imprisonment. Defendant filed an application for leave to appeal, and a motion for rehearing in this Court, which was denied. Defendant then filed an application for leave to appeal to the Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted. We reverse.

On the date of the incident, at approximately 5:15 p.m., Officers Stephen Mayfield and Cedric Kendall of the Flint Police Department drove into Dewy Park, which was a posted drug loitering area. The officers were driving an unmarked police car and wearing plain clothes. As

the officers entered the park, they saw a man leaning against a tree and drinking beer. After arresting the man for the beer, the officers noticed a van, legally parked, with several people inside. The officers noticed "some movements inside. The driver appeared to be hiding something or shifting something around inside of the van." As a result, the officers exited their car and one approached each side of the van. Officer Kendall drew his weapon "when [he] was standing next to the van talking to [defendant]." He held his gun down by his left leg. The occupants of the van were ordered to put their hands up. After repeating the order about four times, the occupants complied. As defendant began to step out of the van, he continued to hide his right hand. Once defendant exited the van, he brought his right hand up to his chest area, and a ziplock baggie containing approximately one half ounce of marijuana dropped to the ground. Defendant was then arrested. A subsequent search of the van and its six occupants produced more marijuana,[1] a razor blade and an opened and used package of cigarette papers. Defendant had a pager and $77 in cash.

Defendant first argues that the trial court erred in refusing to suppress the marijuana evidence where the police did not have a reasonable and articulable suspicion that criminal activity was afoot to justify an investigatory stop. We agree. A trial court's findings of fact following a suppression hearing will not be disturbed by an appellate court unless the findings are clearly erroneous. **People v LoCicero**, 453 Mich 496, 500; 556 NW2d 498 (1996).

The Fourth Amendment of the United States Constitution and its Michigan counterpart guarantee the right of people to be secure against unreasonable searches and seizures. US Const, AM IV; Const 1963,

art 1, & 11; **LoCicero**, supra at 501. However, an officer is permitted to stop a party and make reasonable inquiries regarding his suspicion when the officer observes behavior which leads him to conclude that a party has engaged, or is about to engage, in criminal activity. **Terry v Ohio**, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). This Court has held that in order to justify an investigative stop, the police must have had a particularized suspicion, based on objective observations, that the person stopped has been, is, or is about to be engaged in some type of criminal wrongdoing. **People v Daniels**, 186 Mich App 77, 80; 463 NW2d 131 (1990) (citations omitted). Whether or not the police conduct violates the Fourth Amendment and amounts to an unlawful seizure must be evaluated in light of all the circumstances surrounding the incident in each case. **Id.** at 80-81.

Defendant relies on **People v Shabaz**, 424 Mich 42; 378 NW2d 451 (1985). In **Shabaz**, plain clothed police officers driving an unmarked car observed the defendant on a street at night in a high crime area. **Id.** at 46. The defendant was leaving an apartment building wherein the observing officers had previously made a number of arrests for concealed-weapons violations and narcotics offenses. After looking in the direction of the unmarked police vehicle, the defendant was observed attempting to conceal "a [small] paper bag like under his vest" or "in his pants." **Id.** at 60. When the officers slowed their vehicle to a stop, defendant "took off running." Id. The officers chased the defendant into a building, but did not see anything in his hands. **Id.** at 47. After catching up with the defendant, the officers found a closed brown paper bag in the vestibule of the building, which contained a gun. The defendant was arrested for unlawfully carrying a concealed weapon. **Id.** In concluding that

the **Terry** stop was invalid, the Supreme Court stated, in relevant part:

> While the **crime rate in a neighborhood** may be a valid consideration to be taken into account when assessing reasonable suspicion, that **alone would not establish the grounds for an investigatory stop.** Defendant's presence in a highcrime neighborhood does nothing to distinguish him from any number of other pedestrians in the area. It provides no particular reasonable basis for suspicion as to the activity of the defendant...
>
> **Similarly, defendant's effort to conceal the paper bag in his vest, by itself, did not afford grounds for a stop.** There was no evidence that the size of shape of the bag suggested that it contained a weapon. It may have contained money, liquor, food, jewelry, or any number of small items one might lawfully carry in a small bag and wish to conceal from view while walking down a darkened street in a high-crime area. It might, on the other hand, have contained unlawful contraband or an illegally concealed weapon. It is precisely because the officers could only speculate about the contents of the bag that they had no reasonable or articulable basis to conclude what its contents were.
>
> * * *
>
> **Because the police could only guess about what defen-**

> **dant was seeking to hide their speculation did not provide a particularized suspicion of possessory wrongdoing, but only a generalized one.** [Id. at 60-61 (citations omitted). Emphasis added.]

The Supreme Court concluded that:

> Considering the totality of the circumstances with which the police were confronted before the defendant began to run, it is clear that the officers were entirely without authority to confront the defendant and require him to submit to an investigatory stop and interrogation because, on the basis of what they had observed the officers had no articulable or particularized grounds to suspect, reasonably, that the defendant was, had been, or was about to be engaged in criminal activity. **Nothing in their observation of him to that point provided the objectively reasonable and articulable suspicion that would justify the limited intrusion upon the defendant's liberty and privacy interests permitted under Terry.** [Id. at 62. Emphasis added.]

We agree with defendant that **Shabaz** is controlling and compels reversal of his conviction. Considering the totality of the circumstances with which the police were confronted before they requested that defendant raise his hands, it is clear that on the basis of what they had observed, the officers had no articulable or particularized grounds to reasonably suspect that defendant was, had been, or was about to be engaged in criminal

activity. Here, the plain clothed officers' observations which formed the basis of their particularized suspicion are clear: their observation of a van with several occupants inside legally parked in broad daylight in an area known for drug activity; and their observation of defendant making suspicious movements as if he was attempting to hide something. Both of these grounds, without something more, were specifically rejected by the Supreme Court for supporting a particularized suspicion for a Terry stop. **Id.** at 60-61. The record in this case is devoid of any reference to other specific facts which would cast a suspicious light on defendant's "suspicious movements" or the presence of his van in the parking lot.

We therefore conclude that the investigative stop and seizure of defendant were invalid and, but for this stop and seizure, the evidence would not have been discovered. The circumstances surrounding the seizure of defendant as they appeared to the police officers at the time of the stop, considered in their totality, did not provide the requisite particularized suspicion of criminal activity based on objective observation sufficient to outweigh the defendant's privacy interest under the Fourth Amendment. **Id.** at 65. Therefore, all incriminating evidence flowing from the invalid **Terry** stop and subsequent arrest of defendant should have been suppressed. **Id.**

In view of our disposition of this issue, we need not address defendant's remaining issues on appeal.[3]

Reversed.

/s/Harold Hood
/s/Joel P. Hoekstra

[1] The total amount of marijuana seized from defendant and the occupants of the van was 21.2 grams.

[2] See also, **People v Freeman**, 413 Mich 492-497; 320 NW2d 878 (1982) (where the Supreme Court ruled that the officers' observation of a lone automobile parked, with its parking lights on and its motor apparently running, near a darkened house in a private parking lot at approximately 12:30 a.m. does not, without more, support a reasonable suspicion of criminal activity.)

[3] We note that had we addressed the remaining issues, we would conclude that none have merit.

ORDER

Michigan Supreme Court
Lansing, Michigan

Entered: March 31, 1998

111440 & (40)

PEOPLE OF THE ST OF MICH
Plaintiff-Appellant-
Cross-Appellee,

v

SC: 111440
COA: 199473
LC: 93-49618-FH

MARKEE BAILEY,
Defendant-Appellee-
Cross-Appellant.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The application for leave to appeal as cross-appellant is therefore moot and is DENIED.

I CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 31, 1998

Corbin R. Davis
Clerk

NO. 98-11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MICHIGAN,

Petitioner,

v.

MARKEE BAILEY,

Respondent.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

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STATEMENT OF THE CASE

Relevant Procedural History

After his pre-trial motion to suppress the evidence was denied, the Respondent, Markee Bailey, was convicted of possession of marijuana with intent to distribute after a jury trial in the Genesee County (Michigan) Circuit Court. Mr. Bailey, who possessed one-half ounce of marijuana, was sentenced to imprisonment for 4 to 8 years.

On December 12, 1997, the Michigan Court of Appeals reversed Mr. Bailey's conviction in an unpublished opinion. The Michigan Court of Appeals held that all of the evidence had been seized during an investigative stop for which the police officers had no articulable or reasonable suspicion.

On January 30, 1998, the Petitioner filed an untimely application for leave to appeal in the Michigan Supreme Court. On March 31, 1998, the Michigan Supreme Court unanimously denied the Petitioner's application for failure to persuade the court that the questions presented should be reviewed.

On June 29, 1998, this Court docketed the Petition for a Writ of Certiorari.

Relevant Facts

The facts are undisputed. On July 29, 1993, two police officers arrested Mr. Bailey and five other men who were sitting in a legally-parked van in broad daylight in the parking lot of a city park in Flint, Michigan. After seeing "suspicious movement" from the occupants of the van, the officers approached the van with guns drawn and ordered Mr. Bailey to raise his hands,

produce identification, and get out of the van. In the process of exiting the van, Mr. Bailey dropped a bag containing approximately one-half ounce of marijuana. A search of the van and its occupants revealed that the six occupants of the van, including Mr. Bailey, possessed a grand total of three-quarters of an ounce of marijuana.

Mr. Bailey filed a motion to suppress the evidence seized from his person and from his van. At the evidentiary hearing, the parties and the trial court agreed to use, as the record for the motion, the transcript of Officer Cedric Kendall's testimony from Mr. Bailey's preliminary examination.

Officer Kendall testified that as he was preparing to arrest a man standing in the park with an open liquor bottle, he noticed a van parked in the parking lot. As he approached the van, he noticed Mr. Bailey, who was in the driver's seat, "moving around inside of the van as if he was hiding something either under the seat or somewhere about his body." Officer Kendall then approached Mr. Bailey and, with his gun drawn, demanded that Mr. Bailey produce identification and put his hands up. Officer Kendall noticed that Mr. Bailey was stuffing something under his right leg. Officer Kendall then ordered Mr. Bailey out of the van. As Mr. Bailey exited the van, he dropped a small bag containing the marijuana.

At the suppression hearing, Mr. Bailey argued that the initial encounter was illegal because suspicious movements alone do not amount to an articulable suspicion of criminal activity. The trial court denied the motion, ruling that Officer Kendall could seize Mr. Bailey because of the "very unusual circumstances of movement" in the van.

I. THIS COURT SHOULD DENY CERTIORARI SINCE THE PETITIONER HAS NOT IDENTIFIED AN ISSUE WORTHY OF REVIEW AND SINCE THE STATE APPELLATE COURT'S DECISION IS CORRECT.

Mr. Bailey respectfully requests that this Court deny the Petition for a Writ of Certiorari for two reasons. First, the Petitioner has not attempted to identify any issue on which state or lower federal courts have conflicted or any unsettled issue that ought to be settled by this Court. *See* S. Ct. R. 10. Instead, the Petitioner has expressed its disagreement with the Michigan Court of Appeals' application of the law to the facts of this case. Therefore, the Petitioner has failed to articulate a reason for the exercise of this Court's jurisdiction. *Id.*

Second, the Michigan Court of Appeals' decision was a correct application of *Terry v. Ohio*, 392 U.S. 1 (1968), and *Sibron v. New York*, 392 U.S. 40 (1968), to the facts of this case. The Petitioner concedes that the initial encounter between Officer Kendall and Mr. Bailey was a *Terry* stop. Petition at 7-8. That concession is appropriate, as Officer Kendall testified that he approached the parked van, he had his gun drawn, he ordered Mr. Bailey to put his hands up, and he demanded that Mr. Bailey produce identification. Mr. Bailey was seized as he was certainly not free to decline the encounter with Officer Kendall. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991) (seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen").

In order to justify the *Terry* stop, the Petitioner must point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* at 21. That is, the Petitioner must identify specific and articulable facts amounting to reasonable suspicion. *See Sibron* at 66. As this Court explained in *Terry*, this

standard is not satisfied by an officer's "inchoate or unparticularized suspicion or 'hunch'," but by "specific reasonable inferences which he is entitled to draw from the facts in light of his experiences." *Terry* at 27.

The Michigan Court of Appeals held that there was no such reasonable suspicion here:

> Considering the totality of the circumstances with which the police were confronted before they requested that defendant raise his hands, it is clear that on the basis of what they had observed, the officers had no articulable or particularized grounds to reasonably suspect that defendant was, had been, or was about to be engaged in criminal activity. Here, the plain clothed officers' observations which formed the basis of their particularized suspicion are clear; their observation of a van with several occupants inside legally parked in broad daylight in an area known for drug activity; and their observation of defendant making suspicious movements as if he was attempting to hide something. . . . The record in this case is devoid of any reference to other specific facts which would cast a suspicious light on defendant's "suspicious movements" or the presence of his van in the parking lot.

People v. Bailey, No. 199473 (Mich. App. 1997) (5a-6a).

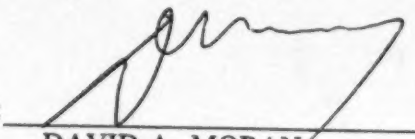
In short, the police in this case had nothing more than a "hunch" at the point that Officer Kendall, with weapon drawn, ordered Mr. Bailey to produce identification and put his hands up. The police had no specific or articulable facts that would justify the conclusion that any crime was occurring, much less any particular crime. The Michigan Court of Appeals was correct, therefore, to reverse the trial court's denial of Mr. Bailey's motion to suppress.

CONCLUSION

Therefore, Respondent Markee Bailey respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

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Dated: July 13, 1998